*THE HON'BLE SRI JUSTICE V.V.S.RAO

+Writ Petition No.25396 of 1995

% 24.01.2006

£ Pallavi Enclave Flat Owners Welfare Association, represented by its

Secretary, Sri Dr.L.Vijaya Kumar

And others

… Petitioners

AND

$ The Principal Secretary, Government of Andhra Pradesh,

Municipal Administration and Urban Development Department,

Secretariat, Hyderabad

And others

… Respondents

Counsel for the Petitioners: MR.K.V.SUBRAMANYA NARSU

Counsel for the Respondent Nos.1 & 5: G.P. FOR MUNICIPAL ADMINISTRATION

Counsel for the Respondent No.2: MRS.V.PREETI REDDY

Counsel for the Respondent No.3: MR.N.RANGA REDDY

Counsel for the Respondent No.4: MR.K.RAGHAVACHARYULU

<Gist:

>Head Notes:

? Cases Referred

1. 1998(6) ALT 540
2. 2003(3) ALT 413 (DB)
3. AIR 1989 SC 860
4. 1999 AIR SCW 2619
5. AIR 2005 SC 1

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THE HON'BLE SRI JUSTICE V.V.S.RAO

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ORDER:

Pallavi Enclave Flat Owners Welfare Association (the Association, for brevity) and nineteen (19) of its members filed the instant writ petition seeking a writ of Mandamus declaring the orders of the State of Andhra Pradesh, the first respondent herein – in G.O.Rt.No.706, dated 17.6.1995 as illegal and arbitrary, to set aside the same and consequently direct respondents 2 and 3 – namely, Visakhapatnam Urban Development Authority (VUDA) and Visakhapatnam Municipal Corporation (VMC) to demolish illegal constructions made by fourth respondent in the premises known as Pallavi Enclave in survey Nos.2/3, 44/3A, 3B, 44/4 and 44/5 of Dondaparthy Village, Visakhapatnam. The petitioners also seek a direction to the fourth respondent to surrender 763.84 Sq.metres of site and also the land covered by 40 feet service road to enable VMC to lay said road. Be it noted that by G.O.Rt.No.706, dated 17.6.1995 the first respondent purporting to exercise the powers vested under A.P.Urban Areas (Development) Act, 1975 (hereafter called, Urban Development Act) relaxed Regulation 10(B)(ii) of VUDA Zoning Regulations to an extent of 164.36 Sq.metres so as to allow 184.36 Sq.metres as against permissible area of 20.00 Sq.metres for the construction of twelve (12) petty shops in excess area of stilt floor area in favour of Sri K.Subba Raju, the Managing Partner of M/s.Rama Raj Enterprises, the fourth respondent herein.

Elaborate pleadings are on record. To resolve the controversy, however, it is necessary only to notice the admitted facts, duly pointing out the allegations, which are not disputed or denied by the rival parties to the case. This is because ultimately the entire case depends on the interpretation of Section 59 of Urban Development Act, Regulation 12 of Zonal Regulations of Hyderabad Urban Development Authority, 1981 (HUDA Regulations, for brevity) and Regulation 19 of Hyderabad

Multi Storied Building Regulations, 1981 (MSB Regulations). Be it noted that HUDA Regulations are applicable to VUDA also.

The fourth respondent is a partnership firm engaged in the business of real estate development. The firm applied to VMC seeking permission for construction of Multi-storied residential apartment block in the premises admeasuring 2,508.03 Sq.mts at Dondaparthy village. As the area falls within the limits of VUDA, the building plans submitted by the fourth respondent were forwarded to VUDA. By proceedings D.Dis.No.1341/91-G3, dated 16.8.1991, VUDA approved the plans restricting floor area ratio (FAR) to below 1:1.50. The request of fourth respondent for construction of 12 shops in the stilt floor area reserved for parking was rejected. VUDA also directed to delete two dwelling units in third floor besides imposing other conditions. There is no denial that in the original plans, the entire stilt area was shown and earmarked for parking. VUDA directed to maintain parking as shown in the original plans and also directed the fourth respondent to handover 40 feet service road to VMC. In pursuance of an advertisement issued by fourth respondent in December 1991, the petitioners 2 to 20 purchased residential flats from the firm. The fourth respondent executed sale deeds in favour of purchasers, in respect of proportionate area of land on which apartments were being constructed.

On 27.11.1992, the fourth respondent made a representation to first respondent through VMC requesting to alter the conditions imposed by VUDA regarding demolition of two apartments in the third floor and refusal for construction of shop rooms in the stilt floor. The first respondent, after considering the request of the fourth respondent, issued orders in G.O.Rt.No.477 dated 17.4.1993 granting permission for construction of two dwelling units in the third floor, but refused permission for construction of shop rooms in the stilt floor. Be that as it is, the fourth respondent constructed twelve shop rooms in the stilt area in anticipation of favourable orders from the first respondent. Though VMC directed the fourth respondent to submit revised plans as per the orders in G.O.Rt.No.477 dated 17.4.1993, the same was not done, but the fourth respondent completed construction of flats. It is alleged that after the petitioners entered into agreement for purchase of flats, the fourth respondent insisted on their giving consent for using stilt area for construction of shops threatening that the firm would not deliver the flats purchased by them. Having paid entire sale consideration, the petitioners had no other go, except to give consent letters to the fourth respondent. The fourth respondent constructed twelve shop rooms in the stilt area and a pent house on the third floor without there being any permission from any authority. These unauthorised and illegal constructions were brought to the notice of the authorities. After issuing notices dated 21.9.1993, VMC demolshed 12 shops in stilt floor.

The fourth respondent filed W.P.No.14905 of 1993 and obtained *ad interim* orders of stay of demolition. Though this Court directed the fourth respondent not to make any further constructions, the fourth respondent again constructed 12 shop rooms on 06.10.1993 and this was also disclosed in the report submitted by the Commissioner of VMC to this Court. The fourth respondent again made another representation to the first respondent seeking relaxation with regard to construction of 12 shop rooms in the stilt area. The first respondent, issued orders in G.O.Rt.No.706 dated

17.6.1995-relaxing Regulation 10(B)(ii) of Zonal Regulations. Apart from raising various contentions, it is also the contention of the petitioners that the State Government issued impugned order without applying its mind to the situation and without authority of law.

The first respondent through its Deputy Director, Municipal Administration, filed counter affidavit sustaining the impugned Government Order. Reliance is placed on Regulation 12 of Zonal Regulations, 1981 and Regulation 19 of MSB Regulations. It is stated that initially all the requests received for relaxation/regularisation of the unauthorised construction, were being placed before a Committee and decision was taken in accordance with the recommendation of the said Committee. In 1998, the Government took a policy decision not to exercise power of relaxation and accordingly issued new FAR policy and Housing Regulations in G.O.Ms.No.422 dated 31.7.1978 and G.O.Ms.No.423 of even date. It is further stated that impugned G.O. was issued after obtaining remarks from VMC, keeping in view that there is sufficient parking space available in the stilt floor subject to the condition that the fourth respondent should surrender 760.83 Sq.metres for 40 feet service road abutting N.H.5 in favour of VMC. If the fourth respondent fails to comply with the same, it shall be open to VMC to proceed against unauthorised constructions made contrary to the sanctioned plan. Even after lapse of six years, the fourth respondent has not complied with the conditions imposed by the Government and therefore, VMC has not granted any licences for carrying on any trade or business in the 12 shops, which are kept vacant till now.

VUDA has filed a separate counter affidavit stating that building permission was granted restricting FAR to 1:1.5 and for construction of residential flats with stilt floor exclusively for parking. VUDA however was not aware of the deviations made by the fourth respondent as the powers of VUDA were delegated to VMC by orders of the Government vide G.O.Ms.No.502 dated 23.10.1991. It is categorically stated that it is VMC, which has to implement the plans in view of the delegation of powers of VUDA under Urban Development Act.

VMC also has filed separate counter affidavit. It is stated that Dondaparthy village where the land is situated was included in VMC limits, that the plan submitted by the fourth respondent for construction of stilt floor, ground floor + three upper floors, was forwarded to VUDA on 05.6.1991, that VUDA granted permission on 16.8.1991 specifically directing the fourth respondent to handover 40 feet service road free of cost to VMC and that the permission for construction of shops in the stilt floor was refused. While submitting remarks to the Government on the representation submitted by the fourth respondent regarding construction of two residential flats on third floor and for construction of 12 shops in the stilt floor, VMC specifically did not make any recommendation for such construction and that the Government issued orders in G.O.Rt.No.477 granting exemption for construction of two residential flats on the third floor subject to the condition that the fourth respondent to surrender 760.83 Sq.metres of land for laying 40 feet service road abutting N.H.5. Pursuant to the orders of the Government, VMC gave an endorsement to the fourth respondent to surrender the site for laying service road. When fourth respondent constructed 12 petty shops unauthorisedly, they were demolished by VMC, but fourth respondent

reconstructed the shops subsequently after obtaining interim orders from this Court. The 12 shops constructed by the fourth respondent in the stilt floor contrary to the directions issued by the Government in G.O.Rt.No.477 dated 17.4.1993. In view of the impugned orders, the revised plan submitted by the fourth respondent was forwarded to the Government and that the third respondent is not in favour of allowing 12 petty shops in the stilt floor.

The fourth respondent filed a counter affidavit through its Managing Partner, K.Subba Raju. The case of the fourth respondent is as follows. A plan was submitted to VMC. When certain objections were raised, a revised plan was submitted on 29.7.1991. The plans were forwarded to VUDA, which accorded permission for construction of stilt floor + three floors duly deleting two dwelling units in the third floor and further imposing a condition that the service road should be handed over to VMC. The fourth respondent was also directed to pay a sum of Rs.1,11,720/-. Aggrieved by this, the fourth respondent filed W.P.No.12025 of 1991 and this Court passed interim orders on 17.9.1991 directing release of the plan immediately on condition of depositing the said amount. VMC accordingly released plans calling upon the firm to handover 40 feet service road free of cost. When the Government revised permissible FAR to 1:2, fourth respondent submitted an application on 27.11.1992 seeking approval for construction of two flats on third floor, twelve petty shops in the stilt floor. This representation was forwarded by the VMC to the Government. Government issued orders in G.O.Rt.No.477 dated 17.4.1993 relaxing Zonal Regulations and permitting construction of two flats in third floor. Thereafter, on 15.5.1993, VMC issued endorsement calling upon the fourth respondent to comply with the said condition. As no orders are passed on the application of the fourth respondent, in accordance with Section 433 of Hyderabad Municipal Corporations Act, 1955 (HMC Act, for brevity), the firm proceeded with construction and completed the construction of two flats and petty shops as per deemed approval under Section 437 of HMC Act. The firm again filed W.P.No.14905 of 1993 when there was a threat of demolition of the shops and two flats in the third floor. This Court stayed demolition on 05.10.1993. In the meanwhile, the first respondent issued impugned order relaxing Regulation 10(B)(ii) of Zonal Regulations. On 01.7.1997, W.P.No.12025 of 1991 filed by the fourth respondent was allowed by Division Bench of this Court holding that leaving 40 feet service road free of cost does not arise and that if the land is required, VUDA has to acquire the land paying compensation to fourth respondent. It is further alleged by the fourth respondent that all the flat owners while taking possession gave letters to the firm that they are satisfied with the space provided for parking, which is more than 640 Sq.metres as against 395 Sq.metres and that they have no objection for the builder using open area northern side of the stilt floor as per his discretion. Therefore, the petitioners are estopped from filing the writ petition. The allegation that the fourth respondent is constructing a pent house on the third floor is denied. It is stated that only small room is constructing in the third floor for providing accommodation to the Supervisor of the flats.

The learned counsel for the petitioners, Sri K.V.Subrahmanya Narsu, submits that

the Government of A.P. has no jurisdiction to issue the impugned Government Order by relaxing VUDA Zoning Regulations. He would further urge that having noticed that parking for all the flat owners was provided in the stilt floor of the building for which VMC granted permission, Government of Andhra Pradesh earlier rejected the request of the fourth respondent vide orders in G.O.Rt.No.477, dated 17.04.1993 and there were no changed circumstances warranting the issue of the impugned order. He further submits that the fourth respondent has no right of his own on the land on which the flats were constructed as the title in the land was proportionately alienated in favour of petitioners 2 to 20 as well as others and therefore the Government could not have permitted the fourth respondent to construct twelve petty shops on the land belonging to the flat owners. He placed reliance on Judgment of this Court in **C.S.R.Estates v H.U.D.A.**, which was affirmed by the Division Bench of this Court in **C.Shekar Reddy v C.S.R.Estate Flat Owners Welfare Association**. The learned counsel would urge that the stilt floor, which is meant for parking of the vehicles, cannot be altered. Lastly, he would urge that the exercise of power by the Government is illegal and that VUDA Zoning Regulations do not empower the Government to grant relaxation permitting the fourth respondent to construct twelve petty shops in the stilt floor.

The learned Government Pleader for Municipal Administration and the learned standing counsel for VMC reiterated the submissions and contentions from in the counter affidavit filed by the first respondent and the third respondent. The learned standing counsel for VMC further submits that the VMC has not granted any permission for commencing any business and that the shops are kept vacant. He also submits that once the shops were demolished after following the procedure under HMC Act, but the fourth respondent reconstructed the shops after obtaining *status quo* orders from this Court. He also submits that VMC is not in favour of construction of shops in stilt floor, which is meant for parking.

The learned counsel for the fourth respondent,
Sri Raghavacharyulu, submits that Regulation 10(B) (ii) of VUDA Zoning Regulations enable the Government to grant relaxation. According to the learned counsel, such power vests in the Government by reason of Section 34 read with Section 59 of Urban Development Act. Secondly, he would urge that as per the original approved plan dated 16.08.1991 construction of residential flats in stilt floor leaving 260 square meters for parking is permissible and therefore construction of shops in the stilt floor is not illegal. He lastly submits that petitioners 2 to 20 have given consent letters for constructions of petty shops and therefore they are estopped from raising objections for the same. In support of his contention that contravention of the building plan, which is not prejudicial to public interest, can be condoned, he placed reliance on the decision of the Supreme Court in **M/s.Rajatha Enterprises v S.K.Sharma.**

In the background of the case and in the light of the rival submissions two points would arise for consideration: the first point is whether the Government has any power to grant relaxation in favour of fourth respondent enabling the constructions of twelve petty shops in the stilt floor of the building. The second point is whether the

Government has exercised the power validly in accordance with law. The two points require consideration together. Before doing so, it is necessary to notice the relevant provisions from the relevant statutes.

The VMC was established under Section 3 of Visakhapatnam Municipal Corporation Act, 1979 (VMC Act). Section 7 of the VMC Act by reference incorporates HMC Act, the Rules and Regulations made thereunder in VMC Act. Therefore, HMC Building Bye laws are made applicable to VMC. The HUDA and VUDA both were constituted under Urban Development Act. HUDA in exercise of powers conferred under Section 59 of the Urban Development Act, with prior approval of Government of Andhra Pradesh, promulgated Zoning Regulations of Bhagyanagar Urban Development Authority Zoning Regulations, 1981 (HUDA Zoning Regulations, for brevity). HUDA also made MSB Regulations, 1981. VUDA by resolution No.363, dated 13.10.1998, made/approved VUDA Zoning Regulations. These Regulations were approved by the Government of Andhra Pradesh in G.O.Ms.No.274, dated 23.05.1989 read with G.O.Ms.No.440, dated 09.08.1989. The VUDA MSB Regulations were also approved by the Government as adopted by VUDA. In the counter affidavit filed by the first respondent, a reference is made to Regulation 12 of HUDA Zoning Regulations and Regulation 19 of MSB Regulations as amended by G.O.Ms.No.39, Housing, Municipal Administration & Urban Development Department, dated 21.01.1982. These two provisions read as under.

Regulation 12 of Zoning Regulations

> 12. The Government may either suo-moto or on an application exempt any proposal for development of any site, sub-division, layout from any of the provisions of these regulations.

Regulation 19 of HUDA MSB Regulations

> 19. Power of Government to exempt
>
> The Government may, on an application exempt any of the provisions of these regulations and all except the regulations No.8, 10(ii) and (iii) and 11 subject to the following limitations, which shall apply to all cases of buildings.

Sl.No.	Plot area	Extent of relaxation for residential buildings	Extent of relaxation for non-residential buildings	Extent of relaxation for other buildings or users
1.	Less than 250 sq.mts	No limit	Upto 60%	- - -
2.	Between 250 and 500 sq.mts.	Upto 50%	Upto 40%	- - -
3.	Above 500 sq.mts.	Upto 30%	Upto 20%	- - -

4.	For religious uses	- - -	- - -	Upto 60% irrespective of the area of the plot
5.	Parking spaces for residential buildings of flats	- - -	- - -	Upto 30%
6.	Parking spaces for offices, commercial and other non-residential buildings	- - -	- - -	Upto 20%

Insofar as Regulation 12 of HUDA Zoning Regulations is concerned, the same confers power on the Government to exempt any proposal from any of the provisions of the Regulations. But Regulation 19 of HUDA MSB Regulations restricts the power of exemption and lays down that Regulation 8, 10 (ii) (iii) and 11 cannot be exempted in any case. Be it noted, Regulation 8 of MSB Regulations deals with means of access and circulation. Regulation 12 deals with parking spaces and Regulation 11 height of the buildings. Insofar as Zoning Regulations and VUDA MSB Regulations are concerned, there is no power vested in the Government to relax the Regulations. The learned Government Pleader for Municipal Administration and learned standing counsel for VUDA, have not brought to the notice of this Court any provision empowering the Government to relax VUDA Zoning Regulations and VUDA MSB Regulations.

As per Regulation 16 of VUDA Zoning Regulations, the land use can be primary residential, mixed residential, commercial, light industrial and general industrial. As per Regulation 16.10.a, in the primary residential zone, buildings shall be permitted only for residence, hotels, dormitories, schools, parks, playgrounds, taxi stands, motor-pumping installations etc. Regulation 16.10.b is to the effect that certain other activities/uses other than mentioned in 16.10.a, may be permitted with special sanction of the authority. These uses *inter alia* include petty shops dealing with daily essentials including retail sale of provisions, soft drinks, cigarettes, newspapers, tea stalls etc., subject to floor area not exceeding 20 square meters. Strong reliance is placed on this Regulation by the learned counsel for the fourth respondent to contend that even in a primary residential zone, business shops can be permitted by the authority.

In the light of the above discussion, this Court is of considered opinion that under VUDA Zoning Regulations or under VUDA MSB Regulations, there is no power vested in the Government or authority to exempt any person from the provisions of the Act. Reliance is placed by the learned counsel on Sections 34 and 59 of the Urban Development Act is misconceived. Section 34 requires every urban authority to carry out the directions as may be issued by the Government from time to time for efficient administration of said Act and empowers the Government to inspect the office of the authority. Section 59 confers the powers on the urban authority to make regulations to carry out the purposes under the Urban Development Act. Though Section 12 of the urban Act empowers the Government as well as the urban authority to modify the Master Plan or Zonal Development Plan, there is no specific

power conferred on the Government or authority to grant exemption to any person from the provisions of the Act.

The impugned G.O.Rt.No.706, dated 17.06.1995, does not refer to any provisions of any Act or any Regulation. However, as noticed supra, the counter affidavit filed on behalf of the first respondent refers to Regulation 12 of HUDA Zoning Regulations and Regulation 19 of HUDA MSB Regulations. Assuming that the fourth respondent was granted exemption and permitted to construct petty shops in the stilt floor under these Regulations, can it be said that the first respondent exercised power properly and legally?. Section 6 of the Urban Development Act requires the urban authority to prepare a master plan for an urban area or group of urban areas declared to be development area. Section 7 further requires the urban authority to prepare Zonal development plan for each of the zones into which the development area may be divided and such Zonal development plan may contain a site plan for development of the zone and show approximate locations and extent of land uses for the purposes of housing (residential), business (commercial), recreational and the like. What are the purposes, for which construction will be allowed in a delineated area or land in the Zonal development plan, is contained in the Zonal Regulations. Regulation 6.1 of HUDA Zonal Regulations visualizes VI zones for specific development like residential, commercial etc. Regulation 6.1.2 provides that various building and occupancy uses to be permitted in the respective zones would be as given in Appendix C. In Appendix C of HUDA Regulations, C-1 deals with purely residential zones – R1, whereas C-2 deals with residential zone with shop lines at ground floor - R2. C.1.1 enumerates the uses and accessory uses which can be permitted in buildings or premises meant for purely residential zone. C-2 in Appendix C describes uses permissible in residential zone with shop lines and lays down that a building or premises with shop lines along a street in a residential zone may be used for the purposes of, personal service establishment, hat and shoe repair, professional service offices, tailor shops, laundry shops, shops for goldsmiths, lock smiths, watch repair, optical glass, musical instruments, flour mills etc. The establishment of shops in the building for residential purpose is, however, subject to condition that such area should be with the shop line and all the goods offered for sale shall not be kept in the passages. It further stipulates that such shops should be abutting a street on which the shop line is marked with access from the front. Insofar as VUDA Zoning Regulations are concerned, as per Regulation 16.10.a in a primary residential zone only such things as enumerated in 16.10.b can be permitted with special sanction of the authority. In a residential zone, if somebody likes to use a building for any of the purposes mentioned in 16.10.b, a special permission is required from the urban authority. No person can be exempted from using the land in residential zone for non-residential purposes without special sanction of the authority. Reading HUDA Regulations as well as VUDA Regulations, it is not possible to accept the submission that these Regulations permit the conversion of stilt floor into a shopping complex by constructing 12 shop rooms. Stilt floor as understood as area where the height of the roof is 8 feet, which is meant for parking the vehicles. Therefore, no construction is permissible in the parking area.

The learned counsel for the petitioners and the learned counsel for the fourth respondent have taken this Court through the necessary permissions as well as sanctioned building plan. These would show that though the fourth respondent initially proposed construction of shops in the area earmarked as stilt floor whether or not it is more than the required area, was meant only for parking. It is also mentioned that under VUDA MSB Regulations (See Regulation 10) every building is required to provide parking space and parking facilities for the use of the occupants and of persons visiting the premises within the site to the satisfaction of the Commissioner of VMC and Executive Authority of VUDA. Such parking facilities should conform to the standards specified in Annexure IV. As per the said Annexure in a residential complex with a dwelling unit with a floor area of 60 square meters to 80 square meters, one parking space for every four dwelling units may be provided and in case the floor area of each building unit is 80 to 100 square meters, the builder has to provide one space for every two dwelling units. The dimension of parking shall be 5 meters x 2.5 meters with a minimum width of drive way of 3.5 meters and the number of car spaces required will be calculated on 75% of the total floor area in the building.

In this case, initially the fourth respondent submitted a plan proposing to construct shops facing north. The entrance of the main building is from the western side and therefore the moment one enters the building one has to go to the parking area through the portion where shops are constructed. VUDA rightly rejected permission for construction of the shops in stilt area because the entire stilt is intended for parking only. Therefore, Regulation 16.10.b has no application for two reasons. The said Regulation permits taking up of construction for the uses other than residential uses and the same does not permit the conversion of stilt parking in a residential complex into a commercial area. Secondly, as per the building plan sanctioned by VUDA, stilt floor was intended for parking only and therefore shops cannot be constructed in the area, which would amount to violation of Regulation 10 of VUDA MSB Regulations

Whether any construction is permissible in the area meant for parking and whether parking area can be converted by the builder into shopping area especially after parting with title by executing sale deeds in favour of the flat owners? These questions were considered by this Court with reference to the Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987, (the Apartments Act, for brevity) in **C.S.R.Estates** (supra). The order of HUDA granting modification to the building was challenged in the said case. The builder obtained permission for construction of stilt and four floors and sold away 42 flats collecting an amount of Rs.20, 000/- extra from each owner towards open parking in the stilt. Sale deeds were also executed in favour of the flat owners conveying the ownership in respect of proportionate extent of land after taking possession of the flats, the owners association constructed compound wall. Thereafter, the builder approached HUDA seeking sanction for closed parking in the stilt area, for conversion of four flats in the ground floor for commercial use and to construct further floors on the terrace. The same was sanctioned on 02.01.1998. The builder then approached the civil Court and obtained *ex parte* injunction and constructed closed mulgies in the stilt and

started constructing additional floor in the terrace besides converting four flats in the ground floor for commercial purpose. At that stage, the flat owners association filed writ petition. It was contended before this Court that the builder is not entitled to make any additions or alterations in a ground floor meant for parking. This Court considered the submissions in the light of the provisions in Apartments Act and after referring to Sections 3(d), 4, 6 and 7 of the Apartments Act, observed that, "whatever space is left for parking in the stilt floor and whatever the space left in other floors as per the plan, the same cannot be modified by the builder". This Court further observed as under.

> If it were to be said that builders can make use of the unsold flats or any common areas in any way they like, it would lead to clearly breach of provisions of this act and the very spirit of the Act. By the impugned proceedings (amended plan) the respondent No.3 is permitted now to put up an additional flats over and above the building already constructed. He is permitted to put up two flats in the fourth floor and two flats in the fifth floor and he was also permitted to convert stilt floor into four covered garages. This modified plan is consequently contrary to Sections 4, 6 and 14 of the Act. It should be made clear that if after selling some flats, if there remains some more flats to be sold by the builder, such builder would be just like any other co-owner, as if he has also purchased those flats by himself. When once the first flat is purchased by any person, for the first time, such purchaser and the builder become common owners for all the amenities and facilities that are provided or to be provided, only according to the plan approved. As I have already stated above, if some more construction is to be made according to the plan approved, he could only complete the same and nothing more. The object of the Act is to protect such poor and middle class flat owners as against the builders, so as to see that the purchaser should know what is the flat he has purchased and what are the facilities in that apartment area. **Suppose beautiful parks and lakes are provided in the plan approved, for the purpose of apartment, they vest with the apartment owner as a common facilities as "deemed to be conveyed with the apartment" in terms of Section 9(2) of the act, even though such right or interest is not specifically mentioned in the conveyance or in the instrument.**
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> (emphasis supplied)

The decision of the learned single Judge in **C.S.R.Estates** (supra) was confirmed by the Divisin bench in **C.Shekar Reddy** (supra). Though the order of the learned single Judge for demolition of the structures made pursuant to the impugned proceedings was set aside giving directions to the HUDA to issue notice to the flat owners before deciding the matter.

At this stage, the submission of the learned counsel for fourth respondent on the question of consent given by the flat owners need to be considered. It is the case of the petitioners that all of them were forced to give consent letters because the fourth respondent threatened not to handover flats if such consent letters are not given. The learned counsel for the petitioners submits that when once the sale deed

is executed by the builder, every apartment owner shall be entitled to the undivided interest in the common area and the same shall not be altered without the consent of all the apartment owners expressed in the declaration executed and registered. Reliance is placed on Section 9 of the Apartments Act. There is force in the submission of the learned counsel for the petitioners. In **C.S.R.Estates** (supra), the learned single Judge considered this aspect of the matter. It was held therein:

> If he has left more vacant space than what is permitted by F.S.I/F.A.R., he has left as per the plan voluntarily. Assuming for the sake of argument that there is a mistake, that mistake becomes final, the moment the plan is approved. In this view of the matter, it follows that now the builder cannot say that he was seeking amendment of the original plan because in the original plan balcony was also included in the F.S.I/F.A.R and the same could not have been included and, therefore, to the extent of area covered by balcony he was entitled to put up further construction. If there is to be any modification to the original building as per the plan, it shall be with the consent of all the flat owners expressed in an amended declaration duly executed and registered as provided in this Act. Therefore, there cannot be any other mode of amending the plan, except as per the "amended declaration duly executed and registered". In fact, under Section 14 of the Act, such declaration is made a statutory declaration and under Section 14(b) it shall contain the "description of the building stating the number of storeys and basements, the number of apartments and the principal materials of which it is or is to be constructed". Under Section 14(d), such declaration also shall consist "description of the common areas and facilities". Section 14(2) of the Act, further directs that the declaration referred to under Section 14(1) may be amended under such circumstances and only in such manner as may be prescribed. In the instant case, it is not the case of the respondents that the original declaration contemplated under Section 4 read with Section 14 of the Act was amended by duly executed and registered, as provided in this Act. From this it follows that according to the approved plan **whatever space is left for car parking in the stilt floor and whatever the space left in other floors as per the plan, the same cannot be modified at all.**
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> (emphasis supplied)

In this case, the fourth respondent has not placed before this Court any amended declaration duly consented to by the flat owners and duly registered altering the percentage of undivided interest in each owner. Therefore, the consent letters if any by the petitioners 2 to 20 do not bar the remedy in these proceedings.

The learned counsel for fourth respondent placed strong reliance on **M/s.Rajatha Enterprises** (supra), in support of the contention that the shop rooms constructed in the stilt do not in ay manner cause prejudice to the flat owners The facts in the said case may be noticed. M/s.Rajitha enterprises obtained a lease of the premises in Bangalore from Government of Karnataka for construction of shopping complex cum school on the basis of licence granted by the Corporation of the City of Bangalore. Permission granted by Corporation was questioned in the High Court in a writ petition, which was partly allowed on 18.07.1986. When the Special Leave Petition was pending before the Supreme Court, the Commissioner

directed the builder to reduce the height of the building having total floor area of 30,415 square feet. In view of this, the Special Leave Petition was disposed of giving liberty to the builder to approach the High Court. The High Court set aside the orders of the Commissioner to demolish fifth floor but the Commissioner was given liberty to compound deviation. However, the order of the Corporation for demolition of sixth floor was upheld. Again the builder filed the Special Leave Petition. It was contended that the excess floor area constructed by the builder was negligible and compoundable. The Supreme Court found that the actual excess area in possession and enjoyment of the builder was only 2,682 square feet, which is within the compoundable limits. Therefore, the Supreme Court came to the conclusion that in the absence of any detriment to public safety or evidence of any public inconvenience and when there is no evidence of dishonest or fraud, the illegal portion cannot be demolished. This decision has no application to the case on hand.

As already noticed hereinabove, construction of multi-storeyed apartment blocks or group housing is now governed by the Apartments Act. When once the builder sells away flats, houses, he has nothing to do with the property. Even if such builder keeps for himself a flat or two, his status would be that of a co-owner and he cannot claim a priority right or pre-emption right. The building laws are inflexible and inexorable laws intended for development in the larger interest of the present and future generation of people. If all the violations in the constructions of buildings are condoned or compounded, it would be mockery of the rule of law. Any contravention of law in the construction of building must entail in demolition as a rule and compounding the violation must be rarest exception. In **M.I.Builders Private Limited v Radhey Shyam Sahu,** dealing with this aspect, the Supreme Court ruled.

> High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions had held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles.

In a recent decision in **Friends Colony Development Committee v State of Orissa**, the Supreme Court while observing that, “violation of Zoning and Regulation laws takes the toll in terms of public welfare and convenience being sacrificed”, laid down as under.

> Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of

exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. **The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into under hand dealings.**

(emphasis supplied)

In view of the observations made by the Supreme Court in **M.I.Builders Pvt Ltd.,** (supra) and **Friends Colony Development Committee** (supra), the submission of the learned counsel for fourth respondent cannot be accepted. As already observed above, fourth respondent's request for construction of shops in the stilt floor was rejected by VUDA as well as the first respondent in 1993. There was no reason again in 1995 to exempt the fourth respondent from the provisions of the Zoning Regulations. Secondly, there is no provision in VUDA Zoning Regulations or VUDA MSB Regulations, empowering the first respondent to grant exemption. Thirdly, Regulation 16.10 of VUDA Zoning Regulations promotes the use of land for non-residential purposes with special sanction of the urban authority, which itself refused such sanction and therefore the builder cannot be permitted to raise constructions. Lastly, it is averred in the counter affidavit of VMC as well as in the affidavit of petitioners that though the shops were demolished by VMC, the fourth respondent obtained interim orders from this Court and reconstructed in October, 1993 and therefore this Court can either condone or compound the contravention.

For the above reasons, writ petition is allowed to the extent and a direction shall issue to Visakhapatnam Urban Development Authority and Visakhapatnam Municipal Corporation to take action for removal of the shops constructed in the stilt floor of Pallavi Enclave in survey Nos.2/3, 44/3A, 3B, 44/4 and 44/5 of Dondaparthy Village, Visakhapatnam, immediately. There shall, however, no order as to costs.

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(V.V.S.RAO,J)

24.01.2006.

pln

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1) Issue order copy in one week.

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One fair copy to the Hon'ble Mr.Justice V.V.S.Rao (for his Lordships kind perusal)

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2 The Visakhapatnam Urban Development Authority rep.by its Secretary.
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3 The Visakhapatnam Municipal Corporation rep.by its Secretary
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